



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

August 23, 1989

Honorable Merrill Hartman
Chairman
Court Reporters Certification
Board
P. O. Box 13131
Capitol Station
Austin, Texas 78711-3131

Open Records Decision No. 527

Re: Whether the Court
Reporters Certification
Board is subject to the
Texas Open Records Act,
article 6252-17a, V.T.C.S.
(RQ-1578)

Dear Judge Hartman:

The Court Reporters Certification Board received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for "[t]he names and addresses of all shorthand reporters who have received a notice of informal hearing regarding disciplinary matters . . . and copies of all notices of formal hearings sent to shorthand reporters." Once the board receives a verified complaint against a shorthand reporter, the board has discretion to hold a hearing. Gov't Code § 52.028(a). Section 52.028(b) of the Government Code requires that the board provide the subject of a complaint with notice of the hearing that includes a statement of the basis for any contemplated disciplinary action. The requestor apparently seeks copies of these letters of notice of hearings. You ask whether the board is subject to the Open Records Act, and if so, whether the board must release the specific information requested.

Section 2(1) of the Open Records Act defines the governmental bodies covered by the act. Subsection 2(1)(G) provides that "the Judiciary is not included within this definition." You suggest that the Court Reporters Certification Board is part of the judiciary within the meaning of subsection 2(1)(G).

Chapter 52 of the Government Code governs the composition, powers, and duties of the Court Reporters Certification Board. The Texas Supreme Court appoints the board, which is composed of a district judge, two attorneys, three official court reporters, three certified shorthand reporters, and three public members. Gov't Code § 52.011(a). The

board's powers include the examination, certification, and discipline of shorthand reporters. Section 52.002 specifies that the supreme court may adopt rules that are consistent with chapter 52 of the Government Code to govern the certification and conduct of court reporters and shorthand reporters.

In Open Records Decision No. 136 (1976), the attorney general determined that the Board of Law Examiners is an extension of the judiciary within the meaning of section 2(1)(G) of the Open Records Act because the Texas Supreme Court appointed the board's members and adopted rules governing the examination and qualification of candidates for licenses to practice law. In Open Records Decision No. 236 (1980), the attorney general stated that the Open Records Act does not apply to the courts and held that the Gregg County Adult Probation Office is exempt from the Open Records Act as part of the judiciary. See also Open Records Decision No. 513 (1988) (records of grand jury are exempt as records of the judiciary). In Benavides v. Lee, 665 S.W.2d 151 (Tex. App. - San Antonio 1983, no writ), however, the court effectively overruled Open Records Decision No. 236, holding that the Webb County Juvenile Board is not part of the "judiciary" simply because the board comprised judges. The functions of an entity, and whether those functions are administrative or judicial, control the determination of whether an entity is part of the judiciary within the meaning of section 2(1)(G). See id. at 151.

The court explained the purpose of the judiciary exception as follows:

The judiciary exception, § 2(1)(G), is important to safeguard judicial proceedings and maintain the independence of the judicial branch of government, preserving statutory and case law already governing access to judicial records. But it must not be extended to every governmental entity having any connection with the judiciary.

Id. at 152; see Open Records Decision Nos. 204 (1978) (information held by county judge that does not pertain to proceedings before county court is subject to Open Records Act); 25 (1974) (records of justice of the peace are not subject to Open Records Act but are subject to common law and statutory rights of inspection).

The Benavides case also calls into question reliance on Open Records Decision No. 136.¹ Under the analysis applied in the Benavides case, the Court Reporters Certification Board is not exempt from the Open Records Act as part of the judiciary. Information in its custody does not pertain to judicial proceedings.

You suggest that Cameron v. Greenhill, 582 S.W.2d 775 (Tex. 1979) aff'g 577 S.W.2d 389 (Tex. Civ. App. - Austin 1978), cert. denied, 444 U.S. 868 (1979), answers the question at hand. In Greenhill, the Texas Supreme Court addressed the exemption of the courts from the Administrative Procedure and Texas Register Act (APTRA), article 6252-13a, V.T.C.S. Section 3(1) of the APTRA provides that the act's definition of "agency" does not include "the courts." The petitioner in Greenhill challenged certain of the Texas Supreme Court's administrative actions regarding special assessments against attorneys. The petitioner argued that when the court exercised purely administrative powers, as opposed to judicial powers, the court did not qualify for the exemption for the courts. The court rejected the petitioner's argument and held that the Texas Supreme Court is not an "agency" subject to the APTRA.

That case is inapposite to the issue at hand. First, Greenhill addresses the applicability of the APTRA to the Texas Supreme Court itself, albeit to the court acting in an administrative capacity. Contrast with that the issue here: whether the Court Reporters Certification Board can be considered part of the judiciary or the equivalent of a court simply because the board is supervised by the Texas Supreme Court. Second, the exemption for "courts" addressed in Greenhill is expressed in different language and serves a different purpose than the judiciary exception of the Open Records Act. The two statutes are not identical. The Benavides decision expressly addresses the applicability of the Open Records Act to a situation like that presented here. For these reasons, the Court Reporters Certification Board is not exempt from the Open Records Act under section 2(1)(G) as part of the judiciary.

1. After Open Records Decision No. 136 (1976) was decided, the Texas Legislature responded to the decision and expressly subjected the Board of Law Examiners to the Texas Open Records Act. See Gov't Code § 82.003(a).

On behalf of the board, you assert that section 3(a)(1) of the Open Records Act protects the requested information from required public disclosure. Section 3(a)(1) protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." No provision of the Government Code or of another statute expressly protects the information requested, i.e., copies of notices of hearings.

You note that the Texas Supreme Court adopted the following rule:

Examination questions and materials, examinations taken by applicants, completed application forms, statements of reference, statements of proficiency, complaints, correspondence and other documents or information in the file of an applicant or certificate holder in the possession of the Board shall be confidential and the contents thereof shall not be disclosed except for names, addresses and certificate status of applicants and such statistical abstracts of information in the files as may be necessary for the Board to evaluate the examination process. (Emphasis added.)

Standards and Rules for Certification of Certified Shorthand Reporters, Rule II, para. E.1 (adopted by the Texas Supreme Court, Jan. 1, 1984). Under this rule, the requested information, notices of hearings, would not be available to the public.

Before it can be determined whether the quoted rule closes the notices of hearings as "information deemed confidential by law" within the meaning of section 3(a)(1), a preliminary issue must be addressed: whether the Texas Supreme Court has the authority to enact this rule. This issue depends on the scope of the supreme court's rulemaking power and may raise basic separation of powers principles.

Article II, section 1, of the Texas Constitution vests governmental powers in three separate departments. Texas cases apply a two-step analysis in resolving separation of powers questions: first, the specific power of each department is determined, and second, the manner of exercising the power is examined. Meshell v. State, 739 S.W.2d 246, 276, n. 2 (Tex. Crim. App. 1987) (and cases cited therein). The power of the judicial department can be

summarized as the power to pronounce a judgment and then effect that judgment between specific parties. Morrow v. Corbin, 62 S.W.2d 641, 644 (Tex. 1933) (citing Muskrat v. United States, 219 U.S. 346 (1911)). The power to make, alter, and repeal laws represents the legislature's power. Government Serv. Ins. Underwriters v. Jones, 368 S.W.2d 560, 563 (Tex. 1963).

Separation of powers principles are relevant to the issue of the supreme court's authority to enact a general rule closing an administrative agency's records because the the court's rulemaking power may differ when the power is primarily judicial, as opposed to administrative, in nature. As a general rule, the courts have only the powers granted expressly or by necessary implication in the Texas Constitution and statutes. In re House Bill No. 537 of the Thirty-eighth Legislature, 256 S.W. 573, 574 (Tex. 1923); see also Morrow v. Corbin, supra, at 644. Courts also have certain inherent judicial powers, powers "woven into the fabric of the constitution by virtue of their origin in the common law and the mandate of Tex. Const. Art. II, Sec. 1, of the separation of powers between three co-equal branches." Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979); cf. Unauthorized Practice Comm., State Bar v. Cortez, 692 S.W.2d 47 (Tex.), cert. denied, 474 U.S. 980 (1985). We are not aware of any judicial decision, however, that requires holding that the court may close the records of the Court Reporters Certification Board.

The Texas Constitution gives the supreme court some rule-making powers. See Tex. Const. art. V, § 31; see also Tex. Const. art. III, § 45. Section 31 of article V of the Texas Constitution provides:

(a) The Supreme Court is responsible for the efficient administration of the judicial branch and shall promulgate rules of administration not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.

(b) The Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.

(c) The legislature may delegate to the Supreme Court or Court of Criminal Appeals the power to promulgate such other rules as may be prescribed by law or this Constitution, subject to such limitations and procedures as may be provided by law.

Section 31 grants the supreme court authority only to enact rules governing business "in the various courts." See also Gov't Code § 22.003. Section 31 does not grant the supreme court the authority to enact rules that control the general conduct of business by administrative agencies. Subsection (a) of section 31 by its terms refers to the administration of "the judicial branch."

Section 52.002 of the Government Code creates and governs the scope of the supreme court's authority to enact rules affecting the Court Reporters Certification Board:

The supreme court may adopt rules consistent with this chapter, including rules governing the certification and conduct of official and deputy court reporters and shorthand reporters.

This provision does not grant the Texas Supreme Court authority to close documents made public under the Texas Open Records Act.

Generally, administrative rules cannot amend the Open Records Act by creating new exceptions to required public disclosure. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 677 (Tex. 1976), cert. denied, 430 U.S. 930 (1977). An administrative agency ordinarily must have clear statutory authority to designate information confidential under the Open Records Act. Attorney General Opinion JM-830 (1987). Because of separation of powers principles, the Texas Supreme Court, when acting in a supervisory capacity over an administrative agency, is subject to the same limits as an administrative agency. The courts' judicial power to seal records in judicial proceedings does not extend to the records of administrative entities that the court supervises in an administrative capacity.

Further, to conclude that the supreme court has the authority under section 52.002 of the Government Code to close the records of the board would run afoul of separation of powers principles. The rule at issue conflicts with the Texas Open Records Act. To conclude that the supreme court

has the authority to, in effect, amend the Open Records Act by creating new exceptions would present separation of powers problems by allowing the court to intrude on the legislature's power. Accordingly, the Texas Supreme Court lacks authority to close the records at issue. Information held by the Court Reporters Certification Board may be withheld only if one or more of the Open Records Act exceptions protects the information from required disclosure. Attorney General Opinion JM-672 (1987).

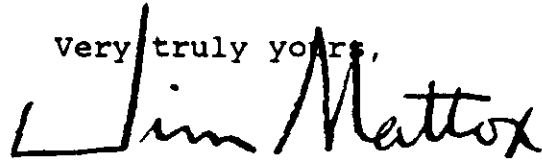
Pursuant to section 7(b) of the Open Records Act, you submitted file copies of the information requested for review. As indicated at the beginning of this decision, the requested information consists of notices of hearings, most of which are form letters simply setting forth the fact that the board received a complaint, describing the board's procedures, and advising the shorthand reporters of their rights. One of the notices advises a shorthand reporter of a formal hearing and provides the reporter with greater detail about the board's procedures and about the provisions of the Government Code that might be relevant to the complaint. None of the notices submitted for review constitutes "information deemed confidential by law" within the meaning of section 3(a)(1) of the Open Records Act. See Open Records Decision Nos. 290 (1981); 94 (1975). The notices must be released.

S U M M A R Y

The Court Reporters Certification Board is subject to the Texas Open Records Act, article 6252-17a, V.T.C.S. The board is not part of the judiciary within the meaning of section 2(1)(G) of article 6252-17a, which exempts the judiciary from the Open Records Act.

The Texas Supreme Court's rule that purports to exempt virtually all of the board's records from public disclosure is invalid because it conflicts with the Open Records Act. The records at issue are public.

Very truly yours,



J I M M A T T O X
Attorney General of Texas

MARY KELLER
First Assistant Attorney General

LOU MCCREARY
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special Assistant Attorney General

RICK GILPIN
Chairman, Opinion Committee

JENNIFER S. RIGGS
Chief, Open Government Section
of the Opinion Committee

Prepared by Jennifer S. Riggs
Assistant Attorney General